STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of GABRIELLA JEANNE VALENTE, Minor.

BARBARA ELLEN VALENTE and ROBERT JOSEPH VALENTE,

Petitioners-Appellees,

v

ROBERT WESLEY ROETMAN,

Respondent-Appellant.

UNPUBLISHED
December 21, 2006

No. 272058
Kent Circuit Court
Family Division
LC No. 05-021576-AY

Before: Meter, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

Respondent appeals as of right from the order terminating his parental rights under MCL 710.51(6). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The petitioner in a stepparent adoption proceeding has the burden of proving by clear and convincing evidence that termination of the noncustodial parent's rights is warranted. *In re Hill*, 221 Mich App 683, 691; 562 NW2d 254 (1997). Termination of the parental rights of a noncustodial parent may be granted when both of the following conditions are met: (1) the noncustodial parent fails to substantially comply with a support order for a period of two or more years preceding the filing of the petition, and (2) the noncustodial parent, having the ability to visit, contact, or communicate with the child, regularly and substantially fails to do so for a period of two or more years preceding the filing of the petition. This Court reviews the trial court's factual findings for clear error. *In re Caldwell*, 228 Mich App 116, 123; 576 NW2d 724 (1998).

Respondent contends that the trial court clearly erred in finding that he failed to substantially comply with the support order because he was incarcerated. However, we addressed the issue of whether MCL 710.51(6) applied to an incarcerated parent in *In re Caldwell*, *supra* at 119. This Court found that, under the clear language of MCL 710.51(6), no incarcerated parent exception existed. *Id.* at 121. This Court also stated that, under MCL 710.51(6)(a), the petitioner need not provide that the respondent had the ability to support the child where a court has previously entered a support order. *Id.* at 122. Rather, the petitioner

need only prove that the respondent failed to comply substantially with the support order for the statutory period. *Id.* In the case at hand, respondent was ordered to pay $59 a week in child support, and $25 a week for medical coverage. The record reflects that the last time the mother received child support was in January or February 2002. Thus, the testimony at trial clearly established that respondent failed to substantially comply with the support order in the two years preceding the filing of the stepparent petition for adoption.

Respondent next contends that trial court clearly erred in finding that he regularly and substantially failed to contact or communicate with his daughter because there was a "no contact order" in effect. Petitioner mother acknowledged that such an order was initially in effect. It appears that when respondent was arrested for allegedly sexually assaulting his daughter, the court ordered that respondent have no contact with the child. However, petitioner mother testified that, once respondent was convicted, the order was no longer in effect. Petitioner mother testified that, while incarcerated, respondent did not write letters to the child, did not send birthday cards, and did not telephone her. Based on the above testimony, and crediting petitioner's testimony, as the trial court was entitled to do, *In re Miller,* 433 Mich 331, 337; 445 NW2d 161 (1989), respondent had the ability to contact or communicate with the child during his incarceration, but failed to so do.

Respondent next contends that the trial court committed reversible error by failing to allow evidence demonstrating that he believed that the no contact order remained in effect during his incarceration. We review a trial court's ruling regarding the admissibility of evidence for an abuse of discretion. *In re Caldwell, supra* at 123.

At the hearing, respondent's attorney attempted to introduce a videotape of respondent's arraignment. It appears that respondent wanted this videotape introduced into evidence to show that a no contact order was in effect. However, as discussed above, petitioner mother admitted that such an order was initially in effect. Because the videotape was cumulative of petitioner's testimony, any error that might have occurred was harmless. *People v Solomon,* 220 Mich App 527, 531; 560 NW2d 651 (1996).

The trial court also refused to admit the affidavit of respondent's criminal defense attorney. As discussed above, petitioner mother testified that she believed that a no contact order was in effect only during the proceedings of respondent's criminal case because the prosecutor had to request another no contact order at respondent's bail hearing after his first conviction was overturned on appeal. Although respondent's belief regarding the no contact order was arguably relevant, the affidavit of his criminal defense attorney was clearly hearsay evidence. Thus, the trial court did not abuse its discretion by failing to allow the affidavit to be introduced into evidence.

Affirmed.

/s/ Patrick M. Meter
/s/ Peter D. O'Connell
/s/ Alton T. Davis